2107.

SUPREME COURT OF THE UNITED STATES.

No. 195.

ABRAM SHEPPARD AND JOHN DUNCAN, PLAINTIFFS IN ERROR,

vs.

PEYTON S. GROVES.

IN ERROR TO THE DISTRICT COURT, UNITED STATES, FOR THE DISTRICT OF TEXAS.

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GIDEON, print.

In the district court of the United States, for the district of Texas.

December term, 1850.

PEYTON S. GRAVES
vs.
ABRAM SHEPPARD and John Duncan.

Transcript for the Supreme Court of the United States.

THE UNITED STATES OF AMERICA,
District of Texas, to wit.

At a district court of the United States, having and exercising the powers and jurisdiction of a circuit court of the same, for the district of Texas, begun and held at the city of Galveston, on the first Monday in December, in the year of our Lord one thousand eight hundred and fifty; present, the honorable John C. Watrous, judge of said district; William P. Ballinger, esq., attorney; Joseph Bates, esq., marshal; and James Love, esq., clerk.

Among other were the following proceedings, to wit:

PEYTON S. GRAVES
vs.
ABRAM SHEPPARD and John Duncan.

Be it remembered, that heretofore, to wit, on the twelfth day of April, in the year of our Lord one thousand eight hundred and fifty, the said Peyton S. Graves, by his attorneys, John W. Harris and Elisha M. Pease, filed his petition in the district here, complaining against the said Abram Sheppard and John Duncan, in the words and of the tenor following, to wit:

THE DISTRICT AND STATE OF TEXAS.

In the United States district court, for the district of Texas.

To the hon. John C. Watrous, judge in and for said district.

Your petitioner, Peyton S. Graves, a citizen and resident of the State of Alabama, respectfully represents unto your honor, that Abram Sheppard and John Duncan, both citizens and residents of the county of Matagorda, in the State of Texas, are jointly and severally indebted to him in the sum of eighteen hundred and forty-five dollars and ninety-four cents, together with interest thereon at eight per cent. per annum, from the first day of January, one thousand eight hundred and forty-five, until paid. For that, heretofore, to wit, at Matagorda, in said State of Texas, on the 23d day of September, 1844, the said Sheppard, who signs his name Abm. Sheppard, and the said Duncan, executed and delivered to your petitioner their joint and several promissory note, dated September 23d, 1844, and signed Abm. Sheppard and John Duncan, by which on the first day of January, eighteen

hundred and fifty, they jointly and severally promised to pay your petitioner or order, at the counting-house of R. & D. G. Mills, in Brazoria county, the sum of eighteen hundred and forty-five dollars and ninety-four cents, for value received, with eight per cent. per annum interest thereon, from the first day of January next, (1845,) until paid; which said debt the said defendants, nor either of them, have ever paid, although the same has been long due and often demanded, to the damage of your petitioner the sum of three thousand dollars. Wherefore he prays that said defendants may be cited to appear and answer this suit at the next term of your honorable court, to be holden at Galveston, in and for said district of Texas, and that judgment may be rendered in favor of your petitioner against said defendants, and each of them, for the said debt, damages, interest, and costs of suit, &c.

HARRIS & PEASE,
Attorneys for plaintiff.

And thereupon, on the thirteenth day of April, in the year of our Lord one thousand eight hundred and fifty, summonses were issued in due form from the said district court, in the word and of the tenor following, to wit:

U. S. DISTRICT COURT,
District of Texas.

The President of the United States of America, to the marshal, or any of his lawful deputies, of the district of Texas, greeting:

You are hereby commanded to summon Abram Sheppard, if he be found in your district, to be and appear before the honorable the district court of the United States, at a court to be holden in and for the district of Texas, at the city of Galveston, on the first Monday of May next, to answer the petition and complaint of Peyton S. Graves against Abram Sheppard and John Duncan, in an action amounting to the sum of three thousand dollars, of which you will serve the said defendant, Abraham Sheppard, with accompanying copy of said petition.

Witness the honorable John C. Watrous, judge of said court, and the seal of said court, at the city of Galveston, this thirteenth [SEAL.] day of April, A. D. 1850, and the seventy-fourth year of the independence of the United States of America.

JAMES LOVE, *Clerk.*

Upon which said summons is the following return endorsed, to wit:

Received April 13th, 1850, and sent to W. S. Spencer, deputy marshal, Brazoria, same day, but owing to his meeting with a serious accident, no service could be made of this summons in time for the May term, 1850.

J. BATES, *U. S. M.*

U. S. DISTRICT COURT,
District of Texas.

The President of the United States of America, to the marshal, or any of his lawful deputies, of the district of Texas, greeting:

You are hereby commanded [to summon] John Duncan, if he be found in your district, to be and appear before the honorable the district court of the United States, at a court to be holden in and for the district of Texas, at the city of Galveston, on the first Monday of May next, to answer the petition and complaint of Peyton S. Graves against Abram Sheppard and John Duncan, in an action amounting to the sum of three thousand dollars, of which you will serve the said defendant, John Duncan, with the accompanying copy of said petition.

Witness the honorable John C. Watrous, judge of said court, and the seal of said court, at the city of Galveston, this thirteenth [SEAL.] day of April, A. D. 1850, and the seventy-fourth year of the independence of the United States of America.

JAMES LOVE, *Clerk.*

Upon which summons the following return is endorsed, to wit:

Received April 13th, 1850, and sent to W. S. Spencer, deputy marshal, Brazoria, same day, but owing to his meeting with serious accident, no service could be made of this summons in time for the May term, 1850. J. BATES, *U. S. M.*

And afterwards, on the thirty-first day of May, A. D. 1850, alias summonses were issued from said district court in due form of the following tenor, to wit:

U. S. DISTRICT COURT,
District of Texas.

The President of the United States of America, to the marshal, or any of his lawful deputies of the district of Texas, greeting:

You are hereby commanded to summon, as you have before been, Abram Sheppard, if he be found in your district, to be and appear before the honorable the district court of the United States, at a court to be holden in and for the district of Texas, at the city of Galveston, on the first Monday of December next, to answer the petition and complaint of Peyton S. Graves against Abram Sheppard and John Duncan, in an action amounting to the sum of three thousand dollars, of which you will serve the said defendant, Abram Sheppard, with the accompanying copy of said petition.

Witness the honorable John C. Watrous, judge of said court, and the seal of said court, at the city of Galveston, this thirty-first [SEAL.] day of May, A. D. 1850, and the seventy-fourth year of the independence of the United States of America.

JAMES LOVE, *Clerk.*

On which said summons is the following endorsement of service, to wit:

Received May 31st, 1850, and executed on the 12th day of October, 1850, by serving the within named defendant with certified copy of petition, and a true copy of this summons.

J. BATES, *U. S. M.*,
By J. B. BATES, *deputy marshal.*

U. S. DISTRICT COURT,
District of Texas.

The President of the United States of America, to the marshal or any of his lawful deputies of the district of Texas, greeting:

You are hereby commanded to summon, as you have before been, John Duncan, if he be found in your district, to be and appear before the honorable the district court of the United States, at a court to be holden in and for the district of Texas, at the city of Galveston, on the first Monday of December next, to answer the petition and complaint of Peyton S. Graves against Abraham Sheppard and John Duncan, in action amounting to the sum of three thousand dollars, of which you will serve the said defendant, John Duncan, with the accompanying copy of said petition.

Witness the honorable John C. Watrous, judge of said court, and seal of said court, at the city of Galveston, this thirty-first day [L. S.] of May, A. D. 1850, and the seventy-fourth year of the independence of the United States of America.

JAMES LOVE, *Clerk.*

Upon which summons is the following endorsement of service, to wit:

Received, May 31st, 1850, and executed same day by serving John Duncan, defendant, with a certified copy of petition and this summons, and exhibiting to him this original.

J. BATES, *U. S. M.*

And afterwards, on the eleventh day of December, A. D. 1850, the following entry was made in this cause, to wit:

PEYTON S. GRAVES
vs. } Continued.
SHEPPARD AND DUNCAN.

And afterwards, to wit, on the sixth day of January, in the year of our Lord one thousand eight hundred and fifty-one, the defendants in this cause, by their attorneys, filed pleas and answer, in the words and of the tenor following, that is to say:

District court of the United States, district of Texas.

PEYTON S. GRAVES
vs.
ABRAM SHEPPARD AND JOHN DUNCAN.

No. 1. And now come the defendants, and say that this court has no jurisdiction over the said plaintiff's petition and the matters therein contained, because he says that the plaintiff, Peyton S. Graves, is not and was not, at the time of the commencement of this suit, a citizen of the State of Alabama, but on the contrary the said plaintiff is and was, at the commencement of this suit, a citizen of the State of Texas, as these defendants are ready to verify. Wherefore they pray judgment, &c.

ABRAM SHEPPARD,
JOHN DUNCAN,
JONES, BUTLER & BALLINGER,
Attorneys for defendants.

District court of the United States, district of Texas.

PEYTON S. GRAVES
vs.
ABM. SHEPPARD AND JOHN DUNCAN.

No. 2. And now comes the defendant, Abram Sheppard, and says, that the return of the marshal on the citation, dated May 31st, 1850, is insufficient in law, and should be quashed; and this defendant is not bound to appear and answer herein by reason of said pretended service of said citation.

And as cause of such insufficiency, this defendant says, that the said return does not state that the said marshal or his deputy delivered to this defendant, in person, a copy of said citation or of the petition accompanying it; that said return was not made or signed by the said J. B. Bates, the deputy purporting to make and sign the same. And of the insufficiency of said return this defendant prays judgment, &c.

ABM. SHEPPARD.

3. And in the above suit comes the said defendant, John Duncan, and says that the citation which issued herein against this defendant, dated May 31st, 1850, is insufficient in law, and should be abated, because the said citation states this defendant to answer the petition and complaint of Peyton S. Graves against Abraham Sheppard and John Duncan, whereas the same is in fact against Abram Sheppard and John Duncan, which is a fatal variance in law, as this defendant is ready [to prove] by the record. Wherefore he prays judgment, &c.

JOHN DUNCAN.

And the said John Duncan further says, that the return of the marshal on the said citation which issued May 31st, 1850, is insufficient in

law, and should be abated; and this defendant is not bound to appear or answer herein by reason of said pretended service therein stated, because the said return does not state that the marshal delivered to this defendant in person a copy of said citation, or of the petition accompanying it, and this defendant is ready to verify by the record. Wherefore he prays judgment, &c.

JOHN DUNCAN.

And now come the defendants, by their attorneys, and without waiving their above pleas in abatement, but fully relying on the same, they say that the plaintiff's petition, and the matters and things therein contained, are not sufficient in law, and these defendants are not bound to answer the same, but demur thereto jointly and severally. And they say that plaintiff's petition does not set forth, or state any good and sufficient cause of action against these defendants or either of them. Wherefore they pray judgment, &c.

And these defendants, for answer to said plaintiff's petition, deny all and singular the matters and things therein stated, and require strict proof thereof in law.

And these defendants say, that they are not indebted to said plaintiff in manner and form as he hath in his said petition *alleges*, and of this he puts himself upon the country.

JONES, BUTLER & BALLINGER.

And afterwards, on the fifteenth day of May, A. D. 1851, the plaintiff, by his attorney, filed the following motion, to wit:

No. 268 *on the law docket, U. S. dist. court for dist. of Texas, May term,* 1851.

PEYTON S. GRAVES
vs.
ABRAM SHEPPARD & JOHN DUNCAN.

Now, at this term of the court comes the plaintiff, and moves the court to strike out the plea to the jurisdiction, and all of the pleas in abatement filed by the defendants in said cause, because the same were not filed in the cause within the time required by law.

F. H. MERRIMAN,
Att'y for plff.

And afterwards, on the sixteenth day of May, in the year of our Lord one thousand eight hundred and fifty-one, the court here passed the following order, to wit:

PEYTON S. GRAVES
vs.
SHEPPARD & DUNCAN.

On motion of plaintiff's attorney, by leave of the court, he filed an amendment to plaintiff's petition.

And thereupon, on the same day, the plaintiff, by his attorney, filed an amendment to his petition in the words and of the tenor following, to wit:

No. 268 *on the law docket, U. S. dist. court for district of Texas, May term,* 1851.

PEXTON S. GRAVES
vs.
ABRAM SHEPARD & JOHN DUNCAN.

In the above named cause the plaintiff, by leave of the court first had and obtained, amends his petition as follows:

On the first page, 5th line, after the word Graves, add "who is."

On the first page, 6th line, strike out the word Alabama, and insert in place thereof the word "Louisiana."

On the first page, 21st line, after the word petitioner, add "who was then a resident citizen of the State of Alabama."

F. H. MERRIMAN,
Att'y for plff.

And afterwards, to wit, on the nineteenth day of May, in the year of our Lord one thousand eight hundred and fifty-one, the following entry was made in this cause, to wit:

PEYTON S. GRAVES
vs.
SHEPPARD & DUNCAN.

This day came the parties, by their attorneys, and thereupon came on to be heard plaintiff's motion [to] the second, third, and fourth pleas of defendants filed in their defence. After argument of counsel heard, because it seems to the court that the law is for the plaintiff, it is ordered that the motion be sustained. And thereupon came a jury of good and lawful men, viz: John L. Darragh, J. A. Thackary, William M. Hudson, Abram Jacobs, Wm. G. Davis, John H. Bennett, James C. Shaw, William Evans, L. W. Dake, R. F. Mitchell, Charles Daniels, and Thomas Pritchard, who, being elected, tried, and sworn well and truly to try the issue joined, returned into court the following verdict: "We, the jury, find for the plaintiff in the sum of two thousand seven hundred and eighty-eight $\frac{89}{100}$ dollars, ($2788 $\frac{89}{100}$.)"

"WILLIAM M. HUDSON,"
"*Foreman.*"

And afterwards, on the twenty-first day of May, in the year of our Lord one thousand eight hundred and fifty, the defendants, by their attorneys, filed the following motion, to wit:

U. S. district court, district of Texas.

GRAVES
vs.
SHEPPARD & DUNCAN.

The defendants move the court to arrest the judgment in this cause, for the following grounds:

1st. That the court erred in striking out the pleas in abatement filed by defendants.

2d. That the court erred in instructing the jury that the burthen of proof was on the defendants, to show that plaintiff was a citizen of Texas.

3d. That the verdict of the jury was contrary to law and evidence.

4th. That the court erred in admitting the note sued on, and overruling defendants' objections to variance in the same; and for other causes apparent on the record.

JONES, BUTLER & BALLINGER,
Att'ys for defts.

And afterwards, to wit, on the twenty-second day of May, in the year of our Lord one thousand eight hundred and fifty-one, the following judgment was rendered by the court in this cause, to wit:

PEYTON S. GRAVES
vs.
Sheppard and Duncan.

And now on this day came on to be heard the motion of defendants to arrest the judgment entered heretofore in this cause; after argument of counsel heard, because it seems to the court that the law is for the plaintiff, it is ordered that the motion be overruled, and the verdict of the jury be entered as the judgment of the *of the* court.

It is therefore considered by the court that the plaintiff recover of the defendants the sum of two thousand seven hundred and eighty-eight dollars and eighty-nine cents, in manner and form by the jurors aforesaid assessed, and his costs about his suit in this behalf expended, for which execution may issue.

On the trial of this cause, the defendants by their attorneys excepted to the opinions of the court, given upon said trial, and tendered their bill of exceptions, which was received, signed, and sealed by the court, and ordered to be made a part of the record in this cause.

The said bill of exceptions is in these words, to wit:

District court of the United States, district of Texas.

PEYTON S. GRAVES
vs.
Abram Sheppard, and John Duncan. } No. 268.

Be it remembered, that on the trial of this cause upon the issues upon

the plea to the jurisdiction, and also the pleas in bar, which by consent of counsel were all submitted together, the plaintiff to support the said issues on his part joined, offered in evidence to the jury the promissory note sued on, as follows: $1,845 94.

On the first day of January, eighteen hundred and fifty, we jointly and severally promise to pay Peyton S. Graves or order, at the counting house of R. & D. G. Mills, in Brazoria county, the sum of eighteen hundred and forty-five dollars and ninety-four cents, for value received, with eight per cent. per annum interest thereon from the first day of January next until paid.

ABM. SHEPPARD,
JOHN DUNCAN.

MATAGORDA, *Sept.* 23, 1844.

To the admissibility of which the defendants objected, on the ground of variance from the note described in the petition in omitting therein the place at which said note was dated, "Matagorda," but the court overruled defendants' said objection; and the said note was read in evidence to the jury.

The defendants then introduced Joseph Bates as a witness, who testified that he had known the plaintiff as a citizen of Alabama in the year 1844; had heard and believed from information, that before the institution of this suit plaintiff had become a citizen of Louisiana, and was now a citizen of said State residing in New Orleans, and connected with a trading house there; had heard that plaintiff travelled and preached in eastern Texas; never knew or heard that plaintiff was a citizen of Texas.

This being all the testimony adduced on either side, defendants' counsel requested the court to instruct the jury.

1st. That if it had not been proved to their satisfaction that plaintiff was a citizen of Louisiana they must find for defendants.

2d. That upon the issue as to the citizenship of plaintiff, the burthen of proof was on the plaintiff to show such citizenship as entitles him to sue.

Both which instructions the court refused to give to the jury; but instructed the jury that the plaintiff was to be considered a citizen of Louisiana as alleged in his petition; unless it was pleaded and proved that he was a citizen of Texas.

To all which rulings of the court, in admitting said promissory note, and refusing said instructions asked, and instructing the jury as above, the said defendants by their counsel excepted, and pray that this their bill of exceptions may be signed, sealed and enrolled before the jury retire, which is accordingly done.

JOHN C. WATROUS, [SEAL.]
U. S. judge.

And thereupon the defendants tendered their bond to the court for approval, which said bond is in the words and figures following, to wit:

PEYTON S. GRAVES
vs.
Abram Sheppard, and John Duncan. } In error.

Know all men by these presents, that we, Abram Sheppard, John Duncan, and Alexander Moore, are held and firmly bound unto Peyton S. Graves above named, in the sum of five thousand six hundred dollars, to be paid to the said Peyton S. Graves, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals this twenty-sixth day of May, A. D. 1851.

Whereas the above named Abram Sheppard and John Duncan have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled cause, by the United States district court, for the district of Texas:

Now, therefore, the condition of this obligation is such, that if the above named Abram Sheppard and John Duncan shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their said plea, then this obligation shall be void. Otherwise to remain in full force and virtue.

ABM. SHEPPARD, [SEAL.]
JOHN DUNCAN, [SEAL.]
ALEX. MOORE. [SEAL.]

Signed, sealed, and delivered in presence of

JAMES LOVE, *Clerk.*

Approved May 26th, 1851.

JOHN C. WATROUS, *U. S. judge.*

UNITED STATES OF AMERICA,
District of Texas.

In the United States district court, for the district of Texas.

PEYTON S. GRAVES
vs.
ABRAM SHEPPARD and JOHN DUNCAN.

I, James Love, clerk of the district court of the United States, for the district of Texas, at Galveston, certify, that the foregoing seventeen written pages is a correct transcript, and true copy, of the record and all the proceedings had in the above entitled cause.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court, at the city of Galveston, this sixth day of November, in the year of our Lord one thousand eight hundred and fifty-one, and of the independence of the United States the seventy-sixth.

[SEAL]

JAMES LOVE, *Clerk.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the judge of the district court of the United States, for the district of Texas, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said district court of the United States, for the district of Texas, before you, between Peyton S. Graves, and Abram Sheppard, and John Duncan, a manifest error hath happened to the great damage of the said Abram Sheppard and John Duncan, as by their complaint appears; and it being fit that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, then under seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this the twenty-sixth day of May, in the year of our Lord one thousand eight hundred and fifty-one, and of the independence of the United States the seventy-fifth.

[SEAL]

JAMES LOVE, *Clerk.*

UNITED STATES OF AMERICA, *ss.*

To Peyton S. Graves, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of district court of the United States, for the district of Texas, wherein Abram Sheppard and John Duncan are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable John C. Watrous, judge of the said district court of the United States, for the district of Texas, this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and fifty-one, and of the independence of the United States the seventy-fifth.

[SEAL]

JOHN C. WATROUS,

District judge of the United States, for the district of Texas.